Supreme Court, U.S.
FILED
MAR 17 2011
OFFICE OF THE CLERK

No. 10-1031

In the
Supreme Court of the United States

NATIONAL CORN GROWERS ASSOCIATION, et al.,
Petitioners,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS NATIONAL CORN GROWERS ASSOCIATION, ET AL.

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QUESTIONS PRESENTED

Does the Environmental Protection Agency have sole discretion to ban a product without an evidentiary hearing required by federal law and the agency's own regulations?

Should the D.C. Circuit have deferred to the EPA without any independent review, in conflict with its sister courts and long-standing Supreme Court precedent?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioners, National Corn Growers Association, et al.[1]

Pacific Legal Foundation is the largest nonprofit, public interest organization of its kind in the country. Founded in 1973, the Foundation provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. The Foundation litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes

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[1] In accordance with Rule 37.3.(a), all parties have been timely informed of Amici's intent to participate in this case and have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

Also, under Rule 37.6. Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel have made a monetary contribution to the brief's preparation or submission.

the annual *Cato Supreme Court Review*, and files amicus briefs in pivotal cases.

In their efforts to protect fundamental constitutional rights, Pacific Legal Foundation and the Cato Institute become involved in cases that raise important public policy considerations that may create significant legal precedents.

This case is of vital concern to the public interest mission of Amici because the D.C. Circuit has established a rule of law effectively authorizing a nationwide ban on a necessary and effective product. Although the product has been safely used for more than four decades, neither the regulating agency nor the Court of Appeals will authorize an evidentiary hearing to resolve the agency's disputed claims that the product suddenly poses an unacceptable risk to the environment and human health. This case encourages government overreaching and establishes a dangerous precedent authorizing unilateral agency control of important markets and commodities with little or no process or meaningful judicial review.

INTRODUCTION

Under the Federal Food, Drug, and Cosmetic Act (FFDCA), the Environmental Protection Agency establishes limits, or "tolerances," for pesticide residues on food. Joint Appendix at 2a (JA). A pesticide residue that exceeds an established tolerance is deemed "unsafe" and may not be moved in interstate commerce. *Id.* The product is effectively banned from use.

The EPA must modify or revoke a tolerance it deems unsafe through a notice and comment process. The EPA first issues a notice of proposed revocation and invites public comment on the proposal. *Id.* at 3a.

Then, the EPA issues a final rule either implementing or withdrawing the proposal. During this stage, any person may file an objection to the final rule. *Id.* Both the Act and the implementing regulations require the EPA to hold a public evidentiary hearing if the objections raise a "material issue of fact." *Id.*

Although Petitioners raised material issues of fact about the EPA's conclusions, the EPA revoked all tolerances for the pesticide carbofuran, without a public hearing.

There is a growing trend among federal agencies and the courts to expand the enforcement power of the government incrementally by adopting statutory interpretations that go beyond their plain meaning and intent. This case exemplifies government overreaching.

Contrary to common sense, clear language, and conflicting precedent, the D.C. Circuit held that a question of material fact as to the safety of a regulated product, that would normally trigger a statutory right to an evidentiary hearing, under the FFDCA, is nothing more than a "dispute between experts" and that the court will not substitute its judgment for that of the agency. This decision gives the EPA sole and complete discretion to determine which of thousands of products may be prohibited from use, without the benefit of a hearing, thereby depriving the public of arguably safe, effective, and even necessary products, and the manufacturers and suppliers of those products of their property and livelihood.

To be sure, summary judgment decisions ease the administrative burdens on regulatory agencies, like the EPA in this case, but at what cost? At the expense of

reliable decision making and fundamental fairness. The right to not be deprived of one's property without a fair process is a bedrock principle of American jurisprudence. *See* U.S. Const., Amend. V. It is a breach of the public trust when federal agencies fail to follow the very laws they are bound to enforce. And, when they are abetted by the courts, it serves only to undermine public confidence in government institutions.

To restore that confidence, this Court should review this case and reverse the decision below.

STATEMENT OF THE CASE

Carbofuran was registered for use in 1969 by the EPA. For more than 40 years carbofuran has been safely used for pest control for a variety of crops, including corn, sunflowers, pumpkins, and potatoes. *National Corn Growers Ass'n. v. U.S. Environmental Protection Agency,* No. 10-1031, Petition for Writ of Certiorari at 7 (Feb. 16, 2011) (Pet.). During the 1980s, carbofuran was widely used on 35 domestic crops with an annual application rate of 10-11 million pounds a year. *Id.* Although its use is more limited today, carbofuran is still an indispensable product for some crops.

Like virtually any chemical, carbofuran can affect human health if exposure levels are high enough. However,"[t]here has never been a documented incident of any person suffering adverse health effects from dietary exposures to carbofuran, either from food or drinking water." Pet. at 7-8.

Nevertheless, in 2008-2009 the EPA determined that the pesticide posed an unacceptable risk to human health due to aggregate exposure in drinking water.

JA at 5a. This determination was based on a new worse case groundwater model and assumed the admittedly unlikely event "that 100% of crops that could be treated with carbofuran would be so treated." Pet. at 9.

To dispute the EPA's findings, Petitioners submitted extensive comments on the proposed revocation, including data that showed carbofuran did not exceed 4.25% usage in any watershed, let alone 100% as the EPA assumed. JA at 5a-6a. Petitioners also provided evidence that refuted the EPA's conclusions about the vulnerability of soils to leaching. *Id.* at 11a-13a. Moreover, Petitioners specifically raised four issues in objection to the final revocation:

> What are the concentrations of carbofuran in (1) surface water and (2) ground water; (3) what is the half-life of carbofuran, which is relevant in determining the extent to which an individual recovers between exposures; and (4) what is the 'safe dose' of carbofuran, "*i.e.*, the level below which exposures will not result in adverse effects."

JA at 5a-6a.

With respect to comments submitted on the proposed revocation, the EPA concluded the information was incomplete. With respect to comments submitted on the final rule, the EPA concluded the information was simply repetitive of the prior comments and did not consider it. Pet. at 26-29. Thus, in keeping with past practice, the EPA determined that these disputes did not rise to the level of a "material issue of fact" and denied Petitioners an evidentiary hearing. In the nearly forty years the EPA has been

required to hold a hearing of this type, it has never done so. *Id.* at 16.

On appeal, the D.C. Circuit adopted the view that "whether an issue is material differs from our review of a summary judgment rendered by a district court, which we review *de novo*." JA at 7a. Instead, the Circuit Court proclaimed the "proper standard of review here . . . is 'necessarily deferential.'" Citing its own prior ruling in *Community Nutrition Inst. v. Young*, 773 F.2d 1356, 1363 (D.C. Cir. 1985), the panel concluded:

> Mere differences in the weight or credence given to particular scientific studies, or in the numerical estimates of the average daily intake levels of [a substance], are insufficient. [We] will not substitute [our] judgment on highly technical and factual maters for that of the agency charged with the supervision of the industry.

Id.

On the issue of whether a hearing is required to resolve a material dispute, the court held: "[O]ur review 'is limited to an evaluation of whether [the agency] has given adequate consideration to all relevant evidence in the record.'" JA at 7a (citing *id.* at 1362). After acknowledging a legitimate dispute between EPA and Petitioners as to application rates and whether carbofuran will be applied to soils vulnerable to leaching into groundwater, the court concluded that such a "dispute between experts" was "fatal" to Petitioners' request for a hearing because, "[a]s we said in *Community Nutrition*, we will not overturn an agency's finding [that] there is no material

issue of fact based upon '[m]ere differences in the weight or credence given to particular scientific studies." JA at 13a (citing *Community Nutrition*, 173 F.2d at 1363).

SUMMARY OF THE ARGUMENT

It does not overstate the case to say that the decision below gives the EPA *carte blanche* to determine the fate of literally thousands of products in the market. This case is not limited to carbofuran or pesticides alone. It sets a precedent for other products regulated under the Federal Food, Drug, and Cosmetic Act, including "prescription drugs, medical devices, agriculture, food products and additives, and many other consumer products." Pet. at 4. For this reason, review should be granted.

It is evident from the facts in this case, and the EPA's ongoing failure to ever hold a revocation hearing, that EPA has created a "no win" situation for Petitioners. Although the FFDCA and EPA regulations clearly require a public evidentiary hearing, *see* 21 U.S.C. § 346(g) and 40 C.F.R § 178.32(b), in a revocation proceeding, when material issues of fact are raised, the EPA invariably finds all contrary evidence insufficient for such a hearing. This is so unlikely as to defy belief, but the D.C. Circuit has refused to question EPA findings in such cases.

In effect, the court has written "material issue of fact" out of the Act. According to the D.C. Circuit, a disagreement over determinative facts, in a technical case, is nothing more than a "dispute among experts." Rather than embrace such a dispute as a classic issue of material fact, as commonly defined and as other courts have done, the court has declared that

differences in scientific studies and numerical estimates are simply "insufficient" for judicial review. Instead, the court held, it must defer to the agency, thereby, giving the EPA free rein to determine whether a product may move in interstate commerce.

Although the D.C. Circuit acknowledges that the FFDCA hearing requirement is based on a summary-judgment-type process, the court refused to apply a summary-judgment-type standard of review to its application, like it would in a district court case. But there is a greater need for searching appellate review of administrative summary decisions than judicial summary decisions because unlike a district court, the EPA is not a neutral arbiter of the facts. To the contrary, the agency' objectivity is compromised because it must defend itself against Petitioners' objections.

ARGUMENT

The D.C. Circuit's holding that a "dispute between experts" is fatal to a request for an evidentiary hearing under the FFDCA undermines the Act, nullifies legal safeguards, and is contrary to summary-judgment-type proceedings.

A. Review Is Warranted Because the Lower Court Undermined the Legal Requirement for a Hearing Under the FFDCA

It is undisputed that the FFDCA requires the EPA to convene a public hearing if such a "hearing is necessary **to receive factual evidence** relevant to material issues of fact" raised by objectors. 21 U.S.C. § 346a(g)(2)(B) (emphasis added). But the D.C. Circuit, the primary arbiter of administrative rules, has

twisted this clear and unambiguous language beyond all reason.

According to the D.C. Circuit, its review as to whether a hearing is properly denied "'is limited to an evaluation of whether the agency has given adequate consideration to all relevant evidence in the record.'" JA at 7a. This standard flatly and illegally contradicts the statutory language which expressly states that the purpose of a hearing is to "receive factual evidence" related to the material issue of fact. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (If Congress has expressly spoken to the precise question at issue, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.).

The law cannot be read both ways. Either the EPA must determine whether a hearing is required before receiving all the factual evidence relevant to a material issue of fact, as the court has authorized, or it must hold a hearing to receive the evidence of a material issue of fact the EPA is on notice exists, as the plain language of the Act suggests. Two examples illustrate the problem with the court's interpretation.

First, during the administrative proceedings, Petitioners challenged the EPA's assumption that carbofuran would be applied in 100% of the areas in which it was legally allowed by providing data that showed a more realistic application rate of 4.25%. JA at 10a. Although the EPA agreed that "'it is unlikely that 100% of the crop will be treated . . . in most watersheds,'" the agency refused to grant Petitioners a hearing on this issue arguing that Petitioners had

failed to "submit much of the data and the methodology they used" to arrive at their estimate. *Id.*

Second, and likewise, Petitioners challenged the EPA's conclusion that concentrations of carbofuran in groundwater exceeded safe levels. *Id.* at 11a-12a. In their comments on the proposed revocation, Petitioners relied on a "National Leaching Assessment" conducted by "independent water experts" that demonstrated that carbofuran would not be used in areas with high leaching vulnerability. *Id.* at 12a. But as with the other issue, the EPA claimed that Petitioners did not submit the Assessment itself at the comment stage or "explain sufficiently the data and methodologies underlying it." *Id.* It made no difference that additional data was provided at the objection stage of the proceedings. The EPA denied Petitioners' request for a hearing. *Id.*

In recounting these incidents, the court did not question that these disputes raised material issues of fact. To the contrary, the court conceded the point: "The petitioners' challenges to the EPA's conclusion that concentrations exceed safe levels turns, the parties agree, upon a single issue of fact, *viz.*, whether carbofuran will be applied in the areas with soil that is 'vulnerable' to the carbofuran leaching into the groundwater." *Id.* at 11a-12a. But the court ignored this observation and deferred entirely to the judgment of the EPA that a hearing was not required to resolve a clearly determinative dispute.

Under the court's deference standard and EPA practice, therefore, no one could ever obtain a public hearing. Either Petitioners would never satisfy the informational demands of the EPA to warrant a hearing or the EPA would conclude the evidence it was

provided was insufficient to change the outcome of the revocation order and a hearing is unnecessary. This "catch-22" makes a mockery of the Act and no doubt accounts for the implausible fact that the EPA has never held a public hearing on a revocation rule in the nearly 40 years the hearing requirement has existed.

B. Review Is Warranted To Establish the Proper Standard of Review Under the FFDCA for a Public Hearing

By deferring to the judgment of the EPA on the need for a hearing, the court has effectively written "material issue of fact" out of the Act. According to the court below, a "material issue of fact" must be something other than a "dispute among experts." "Mere differences in weight or credence given to particular scientific studies, or in the numerical estimates of the average daily intake of [a substance], are insufficient." JA at 7a (citing *Community Nutrition*, 773 F.2d at 1363).

But why is this so? In a technical case an argument about a "material issue of fact" will almost always be a "dispute among experts."

It is axiomatic that a difference in numerical estimates as to the rate of pesticide application within a watershed, or the porosity of the soils, or the quantitative impact on groundwater, or the dose and half-life of a toxic substance, or the weight and credence of scientific studies each can change the outcome of a health assessment as the EPA undertook in this case for carbofuran. This is the very essence of a "material issue of fact" as commonly understood. *See* Theresa L. Lemming, 73 Am Jur § 48 (2d ed. 2010) ("material" means that the contested fact has the

potential to alter the outcome of the dispute and "material facts" are those that tend to prove or disprove an element of a disputed claim).

This common understanding of the term "material issue of fact" was adopted in greater detail in the EPA's own implementing regulations which both the EPA and the court acknowledged but did not follow:

> A request for an evidentiary hearing will be granted if the Administrator determines that the material submitted shows the following:
>
> (1) There is genuine and substantial issue of fact for resolution at a hearing. An evidentiary hearing will not be granted on issues of policy or law.
>
> (2) There is a reasonable possibility that available evidence identified by the requester would, if established, resolve one or more of such issues in favor of the requestor . . . . An evidentiary hearing will not be granted . . . if the Administrator concludes that the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged.
>
> (3) Resolution of the factual issue(s) in the manner sought . . . would be adequate to justify the action requested. An evidentiary hearing will not be granted on factual issues that are not determinative with respect to the action requested.

40 C.F.R. § 178.32(b).

The Circuit Court provided no analysis whatsoever of these hearing factors. To the contrary, the court simply reiterated the EPA's conclusions and upheld the hearing denial. The issues of fact raised by Petitioners with respect to pesticide application rates, vulnerable soils, and contested EPA assumptions are clearly not issues of policy or law under factor (1). Had the EPA considered the data and methodologies on which Petitioners relied (but were denied for lack of a hearing) there is a reasonable possibility that the evidence would have established the fact in Petitioners' favor under factor (2). And were the Petitioners' correct about the facts asserted, they would have justified a different outcome as Petitioners requested under factor (3). EPA's self-serving and predetermined conclusions to the contrary do not satisfy these statutory or regulatory standards.

More to the point, this Court has never held that a "dispute between experts" is fatal to a request for an evidentiary hearing while other Circuits have concluded that such a dispute is a quintessential material issue of fact. *See* Pet. at 23-26, 30-31 (for discussion of circuit splits). In *Hynson, Westcott & Dunning, Inc. v. Richardson*, 461 F.2d 215 (4th Cir. 1972), affirmed in relevant part by this Court in *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973), and discussed in detail throughout the Petition for Certiorari in this case, the Fourth Circuit considered whether an evidentiary hearing was required under the FFDCA given a dispute among the experts about the safety of a drug that was proposed for withdrawal. In that case, the agency claimed there was no substantial issue as to material fact on the same basis the EPA asserted in this case; that the technical studies on which petitioners relied did not

disclose their complete data or methodologies. *Hyson*, 461 F.2d at 221. The Fourth Circuit held, however, that the hearing was required before withdrawing the drug precisely because of a dispute between experts. *Id.* Relying on both constitutional and statutory principles, the court determined that neither due process nor the Administrative Procedure Act permitted an arbitrary denial of a request for a hearing in a case where it can be fairly said there are genuine and substantial issues of fact in dispute. *Id.*

C. Review Is Warranted To Curtail Abuse of the Administrative Process

The D.C. Circuit acknowledged that the parties agreed the FFDCA and the EPA's regulations establish a "summary-judgment-type" standard for determining whether to hold an evidentiary hearing. JA at 6a. But this is a small concession as both the Act and the regulations require a hearing when material issues of fact are raised. Nevertheless, the court held that its "review of the EPA's exercise of discretion in determining whether an issue is material differs from our review of a summary judgment rendered by a district court, which we review *de novo*." *Id.* at 6a-7a. Rather, the court concluded its review is limited to an evaluation of whether the agency adequately considered the record. *Id.* at 7a.

The court provided no principled justification for this difference. Nor can it. Greater safeguards are needed to protect Petitioners in the administrative process than in the judicial process. Among other things, summary judgment in the district court at least involves a neutral arbiter. This is certainly not true in an administrative setting where the agency is

defending itself. Therefore, the agency has an inherent bias.

This bias was on ready display in this case when the EPA discounted any evidence Petitioners submitted as incomplete, redundant, or unreliable and doggedly held to its revocation ruling with self-serving rationalizations. *See* Pet. at 11 n.3 ("EPA's order is replete with such analysis."). In one outrageous example, the EPA revoked import tolerances for carbofuran even though the EPA acknowledged exposure to the pesticide from imported foods was safe. JA at 14a. The justification the agency offered in support of this nonsensical ruling was twofold: (1) that the Petitioners' request to leave the import tolerances in effect was untimely and (2) that the Petitioner's request to leave the import tolerances in effect was argued in the alternative and was, therefore, invalid. *Id.*

As to the first justification, the court held it was "untenable" because Petitioners had timely made the request on at least two occasions. As to the second justification—the argument in the alternative—the court stated bluntly: "That is a strange idea, rejection of which requires no display of learning." *Id.* In the end, the court determined that EPA's revocation of the import tolerance was arbitrary and capricious under the Administrative Procedure Act and reversed that part of the EPA's ruling. *Id.*

But there were other examples of blatant bias the court left intact. As with the import tolerances, the EPA denied Petitioners a hearing claiming their detailed arguments about the concentration of carbofuran in groundwater and surface water were untimely although these arguments were properly raised at both the comment and objection stages. *See*

Pet. at 9-10. And, beyond all reason, the EPA claimed it was compelled to assume that carbofuran would be applied to its full legal extent—to 100% of authorized crop use—when Petitioners provided evidence that this was an unreasonable assumption and the product was typically used only on 4.25% of crops for which it was authorized. JA at 5a-6a.

Unfortunately, this cavalier treatment of the evidence is not just an isolated event. The undisputed fact that the EPA has never held an evidentiary hearing of this type should give pause to the most devout agency apologist. The EPA has openly expressed its disfavor of the hearing requirement, if such was not evident from the agency's actions. According to the EPA, FFDCA hearings are "time-consuming" and "unnecessary." Pet. at 16. Such hearings may be time-consuming, but they are required by law. The necessity of such hearings to contest EPA's entrenched positions should now be self-evident. Such hearings are required for the obvious purpose of providing a fair process to Petitioners before depriving them and the public of a valuable commodity.

Carbofuran has "few, if any effective alternatives." *Id.* at 8. Therefore, the economic impact of banning the product is substantial. "Banning carbofuran is estimated to cost growers, applicators, vendors, and the downstream farm economies $86-254 million from the loss of carbofuran on corn, $56-190 million from its loss on potatoes, and $13-22 million from its loss on sunflowers." *Id.* at 8. But this is only one example of many thousands of products subject to regulation under the FFDCA.

In addition to the FFDCA hearing requirement, the Administrative Procedure Act (under which this

case was brought) was promulgated to protect the public from agency abuse of the kind revealed in this case.

> Within the expanding administrative state, the people are left with no choice but to rely on the protection offered by a reviewing court. For with the delegation of legislative power to administrative agencies, the people's political protection against legislative abuse is made less effective.

Prof. James C. Thomas. *The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: Fifty Years with the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 Tulsa. L.J. 259, 284 (1996).

Thus,

> [t]he role of the courts in the new Administrative Procedure Act was well defined in both the House and Senate Committee Reports. With respect to Congress' intent for "scope of review," each report stated in identical language: "*Reviewing courts are required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of agency action.*"

Id. (emphasis added).

D. Review Is Warranted To Establish That Complete Deference Is Not Compatible with a Summary-Judgment-Type Proceeding

Because the FFDCA provides for a summary-judgment-type hearing requirement, the D.C. Circuit should have applied a summary-judgment-type review as this and other courts have done. In *Crestview Parke Care Center v. Thompson*, 373 F.3d 743 (6th Cir. 2004), the Circuit Court was called on to determine if the Care Center was properly denied a hearing in an administrative summary judgment process analogous to the FFDCA. The court ruled that the imposition of an administrative penalty without an agency hearing was a misapplication of the summary judgment standard. *Id.* at 755. The court explained that in evaluating whether summary judgment is proper, it does not weigh the evidence but it does review the evidence in the light "most favorable" to the petitioner, *id.* – which neither the EPA nor the D.C. Circuit did in this case.

The Sixth Circuit went on to explain that it was improper for the agency to compare the relative strength of the evidence adduced by the agency and the petitioner without a hearing because when both sides offer differing arguments about the underlying question, "this is a factual dispute at its essence." *Id.* "This factual dispute makes the cancellation of an in-person hearing improper." *Id.* at 755-56. But the court in this case came to the opposite conclusion. So long as the EPA claimed there was no "factual dispute at its essence," the D.C. Circuit would defer to the agency judgment.

Finally, the court in *Crestview* observed that if a hearing was held, on remand, the agency would not be obligated to rule in favor of the petitioner.

> Upon remand, the ALJ may conclude in fact that Crestview has not proven it acted reasonably in failing to adhere to these residents' plans of care. Nonetheless, taking the evidence in the light most favorable to Crestview, a genuine dispute of material fact exists regarding the violation of § 483.25. Summary judgment without an in-person hearing on the issue of the asserted violations involving these two residents was thus improper.

Id. at 754.

Similarly, in *Weinberger*, this Court explained the contours of a summary-judgment-type process under the FFDCA. Of primary concern is this Court's directive that a reviewing court must assure itself that the agency's "findings accurately reflect the study in question and if they do, whether the deficiencies [found] conclusively . . . render the study inadequate" to warrant a hearing. 412 U.S. at 622. But this approach cannot be reconciled with the absolute deference the D.C. Circuit gave the EPA in its evaluation of the studies relied on by Petitioners in this case.

To the contrary, this is the very type of review the court below held it could not provide:

> Mere differences in weight or credence given to particular scientific studies, or in the numerical estimates of the average daily intake of [a substance], are insufficient. [We]

> will not substitute [our] judgment on highly technical and factual maters for that of the agency charged with the supervision of the industry.

JA at 7a.

CONCLUSION

The D.C. Circuit has held that the EPA's hearing decisions under the FFDCA must be given absolute deference so that the court does not substitute its judgment for that of the agency. This decision establishes a far-reaching precedent in conflict with the language of the Act, the intent of Congress, and the precedent established by this and other courts that have considered summary-judgment-type agency decisions. Moreover, it institutionalizes administrative abuses the APA and other laws (including the FFDCA) were designed to prevent.

Accordingly, this Court should grant the petition to review that decision.

March, 2011.

Respectfully submitted,

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